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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

CASE 09-56729ASW

CHAPTER 13

Richard Scott Chalgren and
Karen Lee Chalgren,

**RENEWED OBJECTION
TO STANDING RE MOTION
FOR RELIEF FROM STAY
AND REQUEST FOR CONTINUANCE
FOR FURTHER DISCOVERY/
PROCEEDINGS**

Debtors.

Date: April 13, 2011
Time: 2:00 p.m.
Room: 3020

_____/

I.

INTRODUCTION

This Renewed Objection to Standing is being filed at this time because just five days ago, on April 6, 2011, counsel for debtors received a long-awaited response to the debtors' Qualified Written Request to their loan servicer, American Mortgage Servicing, Inc. (hereafter "AHMSI").¹

¹Debtors' first made a Qualified Written Request to their loan servicer, AHMSI, on July 23, 2009. Although AHMSI acknowledged receipt no answer was ever sent. The debtors made a second Qualified Written Request on January 5, 2011 and received a response dated February 22, 2011, postmarked April 4, 2011, and received by counsel for debtors on April 6, 2011.

1 This letter states that, with respect to the loan at play in this Motion for Relief
2 from Stay proceeding, that “[t]he owner and note holder for the above-mentioned loan
3 is Deutsche Bank National Trust Company, as Trustee for GSR Mortgage Loan Trust
4 2006-OA1, Mortgage Pass-Through Certificates, Series 2006-OA1. American Home
5 Mortgage Servicing, Inc. “AHMSI” is the mortgage servicer on this mortgage loan and
6 collects payments on behalf of the owner.” (Letter from AHMSI, attached hereto as Exhibit
7 “A”).

8 This letter is significant because the “Moving Party” was both Deutsche Bank
9 National Trust Company, as Trustee, and American Home Mortgage Servicing, Inc., as
10 Servicer, and they are both represented by the McCarthy & Holthus firm. The “Moving
11 Party” never explicitly stated previously who was the owner and note holder.

12 Even the declarations by Matthew B. Learned dated September 1, 2010 and
13 September 10, 2010 (concerning ordering and inspecting/attaching the promissory note) did
14 not indicate who was the owner and note holder and raise questions which still remain
15 after the response to the Qualified Written Request.

16 On September 1, 2010, counsel for McCarthy & Holthus, Matthew B. Learned,
17 signed a declaration which stated in paragraph 4 that “[o]ur office requested all original
18 loan documents regarding this loan from our client to enable us to review the Original
19 Promissory Note and to prepare declaration pursuant to the Court’s request.” (See Exhibit
20 “B.”) The declaration also states in paragraph 5 that “[o]ur office has been working diligently
21 with our client to obtain the original loan documents. However, as of 09/01/2010, our office
22 has still not received the documents, including the Original Promissory Note.” (See Exhibit
23 “B”).

24 On September 10, 2010, Matthew B. Learned signed another Supplemental
25 Declaration purporting that he “inspected and copied the Original Promissory Note” and
26 attached a copy. (See Exhibit “C”)

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These two declaration raise more questions than they answer.

II.

REMAINING QUESTIONS

1. Why did the attorney for “Moving Party” request the “original loan documents” to review the “Original Promissory Note” rather than *the note itself* which would be expected to have all the endorsements or allonges. If the note that Mr. Learned produced is the *note itself* obviously there are no endorsements or allonges since none are set forth on the note except the first one in blank . (This raises questions set forth in # 4 below).

2. What is the meaning of “Original Promissory Note”? Why did counsel capitalize the first letter of each word? Is that a term of art? What does it signify?

3. Can someone vouch that the note that was inspected and copied is the original note rather than an *image* of the note? How can the attorney state that this is the original note? How does he know that this is not a copy?

4. Did the Note—made payable to American Brokers Conduit and bearing a “Pay to the Order of _____ without recourse” stamp ever get delivered and placed in the trust of the Deutsche Bank National Trust Company, as Trustee for GSR Mortgage Loan Trust 2006-OA1, Mortgage Pass-Through Certificates, Series 2006-OA1 ?

5. If the note did get delivered and placed in the Trust, why does AHMSI have the original loan file including the note in Texas rather than the Custodian of the Trust in New York? ²

III.

THERE IS NO EVIDENCE SUBMITTED TO SHOW THAT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, HAS THE NOTE IN ITS

²See email, copy of which is attached from Matt Learned, counsel for “Moving Party” stating that “The original loan file is held by our client at the following address: American Home Mortgage, Collateral Administration,, 1525 S. Belt Line Rd., Coppell, TX 75019.” (See Exhibit “D”).

1 **POSSESSION AND THAT THE NOTE WAS ACTUALLY DELIVERED TO AND**
2 **PLACED IN THE TRUST**

3 In order to seek relief from the stay, a movant must have a “colorable claim” in the
4 property protected by the automatic stay. *In re Weisband*, 427 B.R. 13, 18 (Bankr. D. Ariz.
5 2010) (citing *In re Wilhelm*, 407 B.R. 392, 400 (Bankr. D. Idaho 2009)) . “In order to
6 establish [such a claim], a movant ...bears the burden of proof that it has standing to bring
7 the motion.” *In re Weisband*, 427 B.R. at 18.

8 In order to have a “colorable claim”, Deutsche Bank, as Trustee, must either own
9 the note or be entitled to enforce the note. But, 1) *we have no declaration by the custodian*
10 *of records of the Trust* that Deutsche Bank owns or holds the Note, 2) *we do not have*
11 *any showing that the note ever was physically delivered to the Trust*, and 3) *we do not have*
12 *a copy of the Mortgage and Loan Schedule which is part of the Pooling and Servicing*
13 *Agreement* showing that the note is identified on that schedule.

14 There have been a series of recent cases which shows that Courts are increasingly
15 requiring such proof. For example, In *U.S. Bank National Association, Trustee, vs. Ibanez*,
16 458 Mass. 637 (2011) two loans were considered, the Ibanez loan, concerning a private
17 placement memorandum (PPM) and the La Race loan, concerning a securitized trust—which
18 is like the securitized trust in this case. With regard to the La Race loan, the Court found that
19 the plaintiff in that case (a quiet title action) did not provide any proof of ownership of the
20 mortgage such as a mortgage loan schedule attached to the PSA, a complete chain of
21 assignments, or a single assignment. *Ibanez*, 458 Mass. at 650, 651. In *Countrywide Home*
22 *Loans v. Kemp*, 440 B.R. 624 (BKCY D. N.J. 2010), the court ruling in a motion to expunge
23 the proof of claim, found that there was no proof that the note ever was placed in the trust
24 of Bank of New York, the trustee of the securitized trust. In fact, at trial,
25 there was testimony by Countrywide that notes were never placed in the trust.

26 In this case, no later than the cut-off date of the trust-August 24, 2006, there should
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1 have been—at a minimum endorsements from American Brokers Conduit (originator) to
2 the sponsor (who we have reason to believe is Goldman Sachs) to GS Mortgage Securities
3 Corp (Depositor) to Wells Fargo Bank, N.A. as Securities Administrator and Master Servicer
4 and Deutsche Bank National Trust Company as Trustee and Custodian. (See Section 2.01 of
5 the Pooling and Service Agreement attached hereto in relevant part as Exhibit “E.”). Section
6 2.01 states in relevant part:

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8 Section 2.01 Conveyance of Mortgage Loans. a) The
9 Depositor, concurrently with the execution and delivery hereof,
10 hereby sells, transfers, assigns, sets over and otherwise conveys
11 to the Trustee for the benefit of the Certificateholders, without
12 recourse, all the right, title and interest of the Depositor in and
13 to the Trust Fund.

14 (b) In connection with the transfer and assignment
15 of each Mortgage Loan, the Depositor has delivered or caused
16 to be delivered to the Custodian on behalf of the Trustee for the
17 benefit of the Certificateholders the following documents or
18 instruments with respect to each applicable Mortgage Loan so
19 assigned.

20 In this case, no evidence of these endorsements has been presented or any other
21 evidence that the note was placed in the trust. According to the Affidavit and Testimony of
22 Professor Ira Markbloom—one of the most distinguished authorities on New York Trust
23 Law—“Unless an asset is transferred into a lifetime trust, the asset does not become trust
24 property” and “A trustee’s act that is contrary to the trust agreement is void.” (See
25 Affidavit attached as Exhibit “F.”)

26 The date that the Note was allegedly transferred is critical to an application of
27 the law that “Movants” rely on in their present motion. In their document filed herein in
28 support of the present motion entitled “Secured Creditor’s Supplemental Response In
Support of Motion For Relief From Stay, dated October 21, 2010, at page 5, lines 3-7, it
reads as follows: “Under California Law, the perfection of transfer of a mortgage takes
place upon physical transfer of the note to the grantee. *Bear v. Golden Plan of
California, Inc.*, 829 F.2d 705, 709 (9th cir. 1986). Pursuant to Cal. Civ. Code 3440, the

1 lack of physical transfer could render the transfer of the note invalid and/or unperfected
2 pursuant to California Commercial Code 9313-9314.”

3 IV.

4 **REQUEST FOR CONTINUATION OF ADEQUATE PROTECTION**
5 **ORDER PENDING 1) EVALUATION OF LOAN MODIFICATION**
6 **APPLICATION, AND 2) FURTHER EVIDENCE FROM DEUTSCHE**
7 **BANK WHO BEARS THE BURDEN OF PROOF AS TO STANDING**

7 In view of the fact that there is a loan modification application pending review
8 which has not been denied, and the substantial questions concerning standing by Deutsche
9 Bank National Trust Company as Trustee, it is hereby requested that 1) pending a decision
10 on the loan modification and 2) pending further evidence by Deutsche Bank to prove that
11 they hold the note and that the note was placed in the trust before the cut-off date of the
12 trust, that the adequate protection order previously entered by this court remain in force and
13 effect pending restoration of the motion to the court’s calendar by either party on 30 days’
14 prior notice.

15 In the meantime, debtors will seek discovery from Deutsche Bank and will file an
16 objection to claim or adversary proceeding to disallow the proof of claim of Deutsche
17 Bank (an adversary proceeding to expunge the proof of claim was the procedural vehicle
18 followed in *Kemp v. Countrywide Home Loans, Inc.*, 440 B.R. at 625, 634).

20 Dated: April 11, 2011 /s/ Michael K. Mehr
21 _____ Attorney for Debtors
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